UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
SIXTH DIVISION

In re:
Gary Weers, BKY No. 91-6-418
Debtor.

State Bank of Cyrus,
Plaintiff, ADV No. 94-6-12
v.
ORDER

Gary Weers,
Defendant.

This matter came on for hearing December 13, 1994, pursuant to Defendant's Motion for Summary Judgment. Appearances were noted on the record. Upon review of the moving papers, arguments of counsel, the files and records herein, and otherwise being fully advised in the matter, the Court now makes this ORDER pursuant to the Federal and Local Rules of Bankruptcy Procedure.

I.

Gary Weers filed for protection under Chapter 7 of Title 11 of the Bankruptcy Code on June 26, 1991. He received his discharge in bankruptcy on October 8, 1991. Two of the discharged debts were a 1981 homestead mortgage note; and, a 1988 personal property note and security agreement, that Weers had entered into with the State Bank of Cyrus ("the Bank").

In 1992, following his discharge, Weers and the Bank executed a new homestead mortgage note. The impetus for this transaction was a foreclosure proceeding and replevin action commenced in Stevens County District Court by the Bank, to recover the real estate and personal property that Weers had pledged to the Bank on the 1981 and 1988 notes. The record does not disclose the balance owing on the notes, or the values of the mortgaged real estate and personal property collateral, at foreclosure and replevin.

The new mortgage note was for $38,000. In exchange for the note, the Bank agreed to forebear foreclosure on the homestead; and, to release a tractor from the security agreement that was the basis for the replevin action.(FN1) The parties agreed that the homestead would be sold and the proceeds used to pay down the new note. Prior to the sale of the homestead, Weers was to be entitled to live on the property rent free. The property was to be marketed for sale in the ordinary course.

Weers made thirteen payments on the 1992 note, then fell into default. On April 30, 1994, the Bank commenced an action in Stevens County District Court to recover the default. Weers responded, alleging that the Bank's debt had been discharged, and that the new note was an invalid reaffirmation. He then removed the case to this Court.

Weers now seeks summary judgment that the 1992 agreement was an attempted reaffirmation of the previously discharged debts. He claims that failure of the parties to follow the requirements of 11 U.S.C. Section 524(c), renders the note unenforceable as a matter of law. The Bank argues that the 1992 agreement was a completely new and separate transaction, supported by adequate and entirely new consideration; that it was not a reaffirmation of pre-petition debts. Additionally, the Bank claims that the circumstances of the matter present issues of material fact. Accordingly, the Bank urges, summary judgment would be inappropriate.

II.

Summary Judgment will be granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Proc. 56(c). When deciding a motion for summary judgment, the court must view the facts, and reasonable inferences drawn from them, in the light most favorable to the party opposing the motion. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157; 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970); Foster v. Johns-Manville Sales Corp., 787 F.2d 390 (8th Cir. Ct. 1986); Saeger v. ITT Financial Services, 119 B.R. 184(Bankr. D. Mn. 1990).

Debts that are otherwise dischargeable can be reaffirmed by debtors, who then remain personally liable for them. The procedure for reaffirmation of dischargeable debts is found in 11 U.S.C. Section 524(c). The statute provides in pertinent part:

> (c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if --
>
> > (1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;
> >
> > (2)(A) such agreement contains a clear and conspicuous statement which advises the debtor that the agreement may be rescinded at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim; and
> >
> > > (B) such agreement contains a clear and conspicuous statement which advises the debtor that such agreement is not required under this title, under nonbankruptcy law, or under any agreement not in accordance with the provisions of this subsection;
> >
> > (3) such agreement has been filed with the court...

Weers argues that the 1992 post discharge note was actually an attempted reaffirmation of the 1981 and 1988 pre-petition discharged obligations. He claims that the obligation is unenforceable, as a matter of law, because it was not entered prior to the discharge as required by 11 U.S.C. Section 524 (c).

Weers cites Matter of Gilliland, 62 B.R. 587 (Bankr. D. Neb. 1986), in support of the argument. In Gilliland, the debtors exchanged a post discharge promissory note for the right to retain collateral that was subject to a discharged obligation. No reaffirmation agreement had been executed prior to discharge or filed in the debtor's bankruptcy case. The bankruptcy court found that the post discharge transaction was an attempted reaffirmation and that the debtors could not be held liable on the note because the reaffirmation did not comply with Section 524(c).

Whether a post discharge agreement between a debtor and a secured party involving collateral securing a discharged debt be an attempted reaffirmation of the old debt or a completely new transaction, is ordinarily a question of fact. Circumstances of the collateral; its value; relative bargaining positions of the parties; the amount and terms

of the post discharge debt acquired by a debtor in the transaction; and, motivation and intention of the parties, are all appropriate considerations in the determination.

The Gilliland decision was based on a finding of fact.(FN2) So should the decision here be based. Summary judgment is not appropriate because the facts, relevant to the appropriate considerations from which a finding can be made, have not been presented.

III.

Accordingly, for the reasons stated, Defendants motion for summary judgment is DENIED.

Dated: March 13, 1995. By The Court:

Dennis D. O'Brien
Chief U.S. Bankruptcy Judge

FN1 Weers had claimed the tractor as an exemption from his estate, valuing it at $9,000.

FN2 The Gilland court stated:

> "This Court finds as fact that the debt upon which the Bank has now obtained a judgment is a debt that was discharged in bankruptcy. The note itself states that fact. No new consideration was given."
> Gilliland, 589.